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No. ~~95-968~~

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

JEAN KERTESZ,

Petitioner,

v.

ALBERT CARY PLOTKINS,

Respondent.

On Petition for Writ of Certiorari
To The Court Of Appeal
Of the State of California,
Second Appellate District, Division One

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent objects to the form of the Question Presented by Petitioner because it incorporates evidentiary matters which are in dispute and because no constitutional question was presented to the Court below.

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No. 95-362

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JEAN KERTESZ,

Petitioner,

v.

ALBERT CARY PLOTKINS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Albert Cary Plotkins, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the California Court of Appeal Second Appellate District's opinion below. The nonpublished opinion of the Court of Appeal is reprinted in the petition for certiorari at Appendix APP 1-15. The order of the California Supreme Court denying the petition for review of the Court of Appeal's decision is appended to the petition as APP 16.

STATEMENT OF THE CASE

Despite Petitioner's characterization of the Question Presented, this petition does not arise out of an action against Petitioner's former employer, the University of Southern California ("USC"). Rather, this is a legal malpractice action which was filed by the Petitioner in California State Court in 1986 and was premised entirely on State common law theories of professional negligence and fraud against Respondent, an attorney practicing in California.

The gist of plaintiff's malpractice action was that the Respondent had failed to diligently prosecute a wrongful termination action which he had filed on Petitioner's behalf in 1981 against the USC (APP-12). Petitioner's action against USC, which was premised entirely on common law or state statutory theories of recovery, was dismissed by the State Court in 1986 because it had not been diligently prosecuted and could not have been brought to trial within the five year required time frame under California law. Petitioner appealed this dismissal to the California Court of Appeal, which affirmed the order of dismissal in an unpublished opinion. Petitioner then unsuccessfully sought review of this decision by the California Supreme Court and this Court.

The malpractice action which is the subject of this petition went to trial in July, 1991 in the Los Angeles Superior Court. The action proceeded to trial solely upon a single claim for professional negligence, Petitioner having voluntarily dismissed her fraud claim on the eve of trial. At the conclusion of the trial, the jury, utilizing a special verdict form which had been prepared by the Petitioner and approved by the trial Court, and which was based on Instruction No. 16.00 of the California Book of Approved Jury Instructions ("BAJI"), concluded that the defendant, while negligent, was not the legal cause of any damage to the Petitioner. The jury, in effect, found that Petitioner had no legally cognizable claims against USC and, therefore, would not have prevailed in her action against USC if that action had proceeded to trial. In short, the Petitioner failed to prove the causation or "case within a case" element of a legal malpractice action under California law. (APP-9.)

Petitioner appealed from the judgment against her in the malpractice action to the California Court of Appeal. The primary thrust of Petitioner's appeal, as stated by her in Appellant's Opening Brief, was the interpretation of the special verdict form with respect to the jury verdict. As Petitioner stated in her brief:

> "In what follows, appellant will show that (1) the legal cause question in BAJI 16.00 cannot be understood to have the broad

> range the trial court attributed to it, and (2) however that question should be understood, there was no substantial evidence to support a negative answer to it."
> (Appellant's Opening Brief, p. 2.)

On or about May 4, 1995, the California Court of Appeal issued its opinion, which is attached to the petition as Appendix 1-15 affirming the decision of the lower Court. Petitioner then sought review in the California Supreme Court, but such was denied on July 19, 1995. In her petition for review to the California Supreme Court, appellant framed the issue for review as follows:

> "Should professors at universities and colleges in California have a right to rely on the rules and regulations set out in their faculty handbooks as integrated elements of their contracts of employment definitively stating their rights and status as faculty members."
> (Petition for Review, p. 1.)

In summary, therefore, neither federal nor constitutional issues have previously been the focus of Petitioner's arguments in connection with this matter. Rather, Petitioner has raised and argued common law issues of contract law and interpretation.

Although Petitioner correctly states that, while at USC, she worked predominantly on research projects which were funded by grants from the United Stated Department of Energy ("DOE"), and although her salary from USC was funded through the income received from those research grants, her salary checks came from USC, by whom she was employed. Petitioner was not employed by the DOE, and had no contractual relationship whatsoever with the DOE. The research grants in question were between the DOE and USC, and when they expired (as a result of Petitioner's failure to file the necessary progress reports and renewal application), USC ceased paying her a salary. (APP 2-3.) Although Petitioner now apparently concedes that her continued right to receive a salary was, in fact, tied to the research grants, at trial and on appeal to the California Court of Appeal, Petitioner testified to the contrary (i.e., that her salary was not dependent upon grant funding and that she had a right to a continued salary even after cancellation of the grant funds). As Petitioner herself stated in Appellant's Opening Brief:

> "Appellant started receiving paychecks of $1,666.67 per month in July, 1977 (RT 543). The salary checks were issued by USC (RT 598-600), and appellant testified that she had no indication that they came

> from any source other than USC (RT 749-750)."
>
> (Appellant's Opening Brief, p. 8.)

After receiving her doctorate from USC, and in order to facilitate her ability to obtain grants for USC, Petitioner was given the title of Assistant Research Professor. This was a courtesy position which did not carry with it any entitlement to tenure, and the letter appointing her so stated. (Clerk's Transcript ("CT") 2050.)

Both at trial and on appeal, Petitioner argued that numerous provisions of the Faculty Handbook applied to her and gave her certain contractual rights. Despite her arguments, the Petitioner did, in fact, understand the limited nature of her appointment, as is evidenced by a letter she wrote to the USC Faculty Senate in which she describes herself as having "special faculty status." (Exhibit 562, CT 2856.) Since, understandably, most of the Faculty Handbook applied to full-time teaching faculty, the jury found, and the Court of Appeal affirmed, that Petitioner's interpretation of the Faculty Handbook was incorrect. Indeed, the Court of Appeal referred to Petitioner's reading of the Faculty Handbook as "contortionist." (APP-10.)

Most importantly, however, Petitioner has absolutely no factual or legal basis upon which to claim a denial of due process here. Although the provisions in the Faculty Handbook for a due process hearing before termination did not contractually apply to Petitioner (RT 1129-1140), she was, in fact, permitted to participate in the grievance process but voluntarily chose not to complete same. The grievance process described in the USC Faculty Handbook consists of three phases - administrative, followed by a mediation, followed by a due process hearing before a faculty panel. Petitioner completed the first two phases of this grievance process. She then filed a request for a hearing (CT 2694) and received from the appropriate faculty panel the necessary forms to allow her to proceed with this phase of the process. (CT 2695.) In order to receive the due process hearing, all she had to do was complete this form. For reasons that she was unable to explain at the time of trial, she voluntarily chose not to pursue this phase of her grievance. (Reporter's Transcript ("RT") 1081-1083.) (APP-12.)

The grant funds which funded Petitioner's salary expired in 1977. Except for one month in which her superiors were able to find her work on another research project, Petitioner received no salary from USC from and after the expiration of the DOE grant. USC did not insist that Petitioner immediately leave, however, allowing her time to attempt to obtain other research grants. When she

failed to do so, USC informed her in 1979 that she would have to vacate her laboratory. It was only after this notice was given to her that Petitioner commenced the grievance process referred to above. However, as noted, she did not complete that process. Instead, she retained an attorney other than the Respondent herein to file an action in the California Superior Court for an injunction prohibiting USC from terminating her right to use the University facilities. Petitioner's request for an injunction was denied, and her action dismissed in 1980, over a year prior to the time Petitioner consulted the Respondent.

Although Respondent filed a Complaint on Petitioner's behalf, he testified that he only agreed to assist her in the preservation of her claims and that he specifically told her that she needed to obtain other counsel if she wished to pursue the matter. (RT 343.) Petitioner admitted at trial that she had retained Respondent on an hourly, not a contingent fee basis, and that she did not have the financial resources to prosecute the matter, even if she desired to do so. (RT 1489-1491.)

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THIS CASE PRESENTS NO CONSTITUTIONAL QUESTIONS WHATSOEVER

Although Petitioner artfully attempts to re-cast this litigation and the issues presented in it, there have been no constitutional issues previously litigated in this common law malpractice action. Further, Petitioner does not argue that there is a conflict in court decisions on the issue she presents. Finally, Petitioner does not argue that a state court has decided a federal question in a way which conflicts with decisions of this Court. There is, therefore, no predicate for the exercise of this Court's jurisdiction, much less a basis for exercising its discretion as provided for in Rule 10, Rules of the Supreme Court of the United States.

II.

PETITIONER HAD NO CONSTITUTIONALLY PROTECTED PROPERTY INTEREST, NOR WAS SHE DEPRIVED OF DUE PROCESS.

As noted above, until the filing of the petition for writ of certiorari, Petitioner has steadfastly maintained that she was not paid solely through grants from the federal

government, but rather was a full-time employee of the University entitled to whatever rights were enjoyed by all other faculty members and employees of USC. Second, as noted above, Petitioner was given access to the full due process grievance procedure of the University but voluntarily and inexplicably chose not to complete same. Finally, the "notebooks" and other materials which are referred to by Petitioner were maintained in a carbon copy form so that the researcher would have a copy available. (RT 1252.) However, notes taken by the Petitioner which related to research done for USC and for which she was paid by USC would clearly be the property of the University. (CT 1856.)

As the Court will doubtless recognize, the question posed by Petitioner is obviously not a question which would ordinarily arise in a professional negligence action. Rather, it would arise, if at all, in a direct action against USC. Since USC is not a party to this proceeding, an answer to the question which Petitioner has posed could only be relevant, if at all, to the "case within a case" portion of this professional negligence action. Respondent respectfully submits that, even assuming *arguendo* this Court wished to address and answer the question posed by Petitioner, the nature of the subject action would not be a proper forum in which to do so.

More importantly, even if this Court were to address the question presented and to rule that Petitioner had a protected property interest under the Fifth Amendment to the United States Constitution without a hearing, it would not affect the result in this case.

At no time before or during trial in this matter did the Petitioner ever argue that she would have succeeded in her claim against USC because she had a federally protected property interest. The Complaint which Respondent filed on Petitioner's behalf against USC in 1981 contained causes of action for breach of contract, fraud, intentional and negligent infliction of emotional distress and sex discrimination. This Complaint did not allege a violation of any constitutional protection. Moreover, Petitioner's contention was that Respondent had allegedly failed to diligently move the matter forward to trial, not that he had failed to include a claim for a constitutional violation. (APP-12.)

Even if such a violation had been presented to the jury as another potential claim which Petitioner had against USC, it would not and could not have been successful in any event since the jury heard testimony that the Petitioner voluntarily chose not to pursue the full due process rights available to her. In affirming the judgment, the Court of Appeal stated that Petitioner ". . . did not have or allege the deprivation of a 'property right' in her position with USC." (APP-14.)

In summary, Petitioner had no property right to continued employment, was not deprived of any due process by the action of the University, and could not have prevailed even if this Court should adopt Petitioner's argument.

III.

THE ACTIONS OF USC CANNOT BE FEDERAL ACTION SUFFICIENT TO FORM THE PREDICATE FOR A CONSTITUTIONAL VIOLATION.

Petitioner erroneously argues that the making of a research grant by the DOE to USC constitutes government action. Such a conclusion is clearly not supportable, and Petitioner's reliance on Burton v. Wilmington Parking Authority 365 U.S. 715 (1961) is misplaced. There, the Court found that the State and private entity were so intertwined as to be "joint participants" in the challenged activity (365 U.S. 725). Here, there is no evidence to suggest that the DOE attempted to exercise any control over or had any involvement in USC's faculty personnel practices. More importantly, however, such an argument was never made by Petitioner at any stage of this proceeding. Accordingly, Petitioner's statement that this premise was not contested by Respondent or the Court of

Appeal (Petition, p. 20) is incorrect. Now that Petitioner has raised the argument for the first time, Respondent does contest same and will be prepared to discuss it at length if this Court accepts the case for review.

CONCLUSION

The petition for certiorari should be denied.

Dated: November 17, 1995

Respectfully submitted,

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